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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

ALVIN C. HINES,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the District of Columbia
Court of Appeals

Charles S. Carroccio, Jr.
105 South Washington Street
Rockville, Maryland 20850
(301) 424-3035

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

ALVIN C. HINES,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, ALVIN C. HINES, respectfully moves, pursuant to Rule 46 of the Rules of this Court for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. As grounds for this request, petitioner asserts:

1. Petitioner is filing this 28th day of June, 1983, a petition for writ of certiorari to review the judgment and opinion of the District of Columbia Court of Appeals, which affirmed his conviction of second degree burglary while armed in the Criminal Division, Felony branch of the Superior Court of the District of Columbia.

2. Counsel was appointed to represent the petitioner in the Superior Court of the District of Columbia, in the District of Coluimbia Court of Appeals and to file a petition for writ of certiorari under the District of Columbia Criminal Justice Act, 11

D.C. Code Section 2601 et seq.

3. Because of his poverty, petitioner is unable to pay for the costs of this case and is unable to give security for the same.

4. The petition that is attached seeks review of the decision of the District of Columbia Court of Appeals that affirmed his convictions over his claim that the presence of an intoxicated juror in his deliberating jury denied him his right to trial by an impartial jury and to due process of law.

WHEREFORE, for these reasons, petitioner respectfully requests leave to proceed in forma pauperis.

Respectfully submitted,

CHARLES S. CARROCCIO, JR.
105 South Washington Street
Rockville, Maryland 20850
(301) 424-3035

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Motion for Leave to Proceed In Forma Pauperis has been served by mail upon the Honorable Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and on Michael W. Farrell, Esquire, Appellate Division, United States Attorney's Office for the District of Columbia, 4th and John Marshall Place, N.W., Washington, D.C. 20001, this 28th day of June, 1983.

CHARLES S. CARROCCIO, JR.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

ALVIN C. HINES,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

ALVIN C. HINES, the petitioner herein, proceeding in forma pauperis, respectfully prays that a writ of certorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled case on September 15, 1982.

OPINIONS BELOW

The opinion and judgment of the District of Columbia Court of Appeals is reported at Alvin C. Hines v. United States, D.C. App., 454 A.2d 770 (1982), and is printed in the Appendix at page A-1. The Superior Court for the District of Columbia issued no opinion.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on December 29, 1982. The District of Columbia Court of Appeals subsequently issued an Order on March 30, 1983, denying petitioner's timely petition for rehearing or rehearing en banc, without opinion, Appendix, infra, page A-8, and this petition is filed within ninety days of that date. Accordingly, this Court has jurisdiction to review the judgment in question by writ of certiorari under Title 28 of the United States Code, Section 1257 (3).

QUESTIONS PRESENTED

Was petitioner denied his right to a trial by an impartial jury and his right to due process of law when the trial judge failed to declare a mistrial after determining that one juror was so intoxicated that she was incapable of deliberating?

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...

Amendment XIV, Section 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On the morning of December 18, 1980, a holdup occurred at

suite 780, 1411 K Street, N.W., Washington, D.C., in the premises occupied by ADE, Incorporated. The two persons present at the time were bound and the perpetrators fled the scene. A citizen who had been walking in the vicinity, gave the police the discription of a vehicle he saw leaving the area shortly before the police arrived. Just before noon, a police officer returning to the Third District Police Station spotted the automobile in question, parked and unoccupied in the 1700 block of Seaton Place, N.W.. The automobile was placed under observation and after a short period of time two women and petitioner were seen approaching the automobile. The two women entered the automobile and began driving down the street while conversing with petitioner, who was walking on the sidewalk. When they reached the corner they were surrounded by plain clothed and uniformed police officers. Petitioner dropped the bag he was carrying and his coat to the ground. He was arrested and returned to the scene of the incident and identified by a citizen as someone who had been in the building stairwell earlier that day.

Petitioner was arrested and charged with robbing Allen Danneman and Lori Greenstein while armed with a pistol, in violation of 22 D.C. Code Sections 2901 and 3202, and with entering the premises of A.D.E., Inc., with the intent to steal, and while armed with a pistol, in violation of 22 D.C. Code Sections 1801(b) and 3202. He remained incarcerated pending trial, unable to post a $20,000.00 surety bond.

On July 22, 1981, trial began for petitioner and his co-defendants, John McIlwain and Larry Lee, in the Superior Court for the District of Columbia before the Honorable Fred B. Ugast. After several days of preliminary matters and trial, the jury began it's deliberations at approximately 4:10 p.m. on Thursday, July 30, 1981, but recessed for the evening at 5:20 p.m. with instructions to return the next morning at 9:15 a.m. to continue it's

deliberations.

On the morning of July 31, 1981 at approximately 10:20 a.m. the court received a note from the jury asking if they could appoint a new foreperson. While all trial counsel and the judge discussed a response to this note, the marshall indicated to the judge that a juror may be intoxicated.

Earlier that morning a telephone call was received in the trial judge's chambers saying that juror 232 would be late for court. Juror 323, the original foreperson, was late arriving, and there being no juror 232 on the jury the court assumed it was a reversal of numbers and felt it appropriate to begin a voir dire of the jury with her.

When juror 323 was called into the courtroom, she said she was not ill and was able to deliberate. the judge asked if she had been drinking and she responded "no". The next two jurors didn't indicate anything was wrong, however, starting with juror 594, who said that the problem was that the forelady was drunk, the jurors consistently stated the forelady was unable to deliberate.

Juror 276 said, "To my knowledge I think she had a little too much to drink to be in the position that we are in." His statement was based on her appearance and odor in the jury room since deliberations began.

Juror 122 said, "I will tell you like it is. It seems like she is a little intoxicated."

Juror 187 said, "As far as I am concerned, she had been drinking this morning."

Juror 585 couldn't say she was intoxicated, but assumed she was under the influence of some kind, because she was not herself. "Something is wrong with her."

Juror 182 said, "I thought she was incompetent to preside

because of the fact that she was a little intoxicated." He also felt there were indications of drinking by her during the course of the trial.

Juror 174 said she looked "like she was under the influence of alcohol" and her behavior patterns were not consistent. This juror also felt that the forelady should not be on this case this morning.

Juror 281 said the forelady "seemed to be under the influence of alcohol."

Juror 604, who wrote the note asking to change the foreperson, said, "It seemed like she had been drinking and she wouldn't let anyone else talk."

After a brief recess, all defense counsel joined in a motion for a mistrial on the grounds that the juror in question was not competent to deliberate and that defendants were entitled to a jury of twelve persons. The trial court denied the mistrial motion, and declared a recess, because it was not appropriate, in light of the condition of juror 323, to permit deliberations to continue. Deliberations resumed on Monday morning and that afternoon the jury rendered a verdict of not guilty with respect to the two charges of armed robbery, and guilty of the charge of second degree burglary while armed. Petitioner was sentenced to ten (10) to thirty (30) years to run consecutive to any other sentence being served.

Petitioner timely appealed, raising as one of his issues the denial of his constitutional right to trial by a competent and impartial jury. The District of Columbia Court of Appeals affirmed and petitioner's petition for rehearing or rehearing en banc was denied.

REASONS FOR GRANTING WRIT

This petition presents to this Court the opportunity to decide whether a juror's intoxication during deliberations violates a person's right to a fair trial under the due process clause of the Fifth Amendment, and whether such intoxication denies a person his right to a "trial by an impartial jury" as guaranteed by the Sixth Amendment to the United States Constitution, resulting in grounds for a mistrial.

The trial judge after hearing from the jurors acknowledged that there was an obvious problem with the forelady and the deliberations could not go forward. Instead of granting the defense requested mistrial, he granted the jury a three day recess in the hope that the offending juror would be refreshed and then able to deliberate. (Appendix page A-4). What the trial court and the appeal court did not acknowledge is that the prejudice to the petitioner did not arise out the delay in the deliberations, but occurred when the forelady was "somewhat under the influence in a fashion" (Appendix Page A-4) during the deliberations prior to the voir dire of the jury, thus was incorrectable by a recess. The trial courts action is analogous to "closing the barn door after the horse got out." This Court stated in Peters v. Kiff, that "it was well established the the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law. Thus a defendant cannot, consistent with due process, be subjected to trial by an insane juror, (citations omitted) Peters v. Kiff, 407 U.S. 493, at 501 (1972). Petitioner contends that an intoxicated juror should be considered as the same as an insane juror.

The appeals court citing Nelson v. United States, D.C.App., 378 A.2d 657 (1977), "required a showing of some reasonable ground to suspect that the defendant was prejudiced by

the behavior in question." (Appendix Page A-4). "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, at 215. In this case there was a hearing (the voir dire) on the allegation of juror intoxication and it was quite clear to the trial court that there was a problem. The appeals court attempted to minimize the significance of this by saying [i]t is thus doubtful that any significant deliberations occurred Friday morning. As soon as the problem was brought to the court's attention, the voir dire was held and a recess was ordered." (Appendix Page A-5). What the appeals court is doing is assuming that nothing significant happened Friday morning, but that is unknown. What is known is that there was an incompetent juror deliberating, creating the appearance of bias to petitioner. "[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." Peters v. Kiff, 407 U.S. 493 at 502 (1972).

Courts have been granting new trials because of the use of intoxicating liquors by jurors during their deliberations since at least 1891 when the New York Court in People v Shad, 58 Hun 571, 12 NYS 695 (1891) said, ". . . the use of intoxicating liquor by jurors while deliberating on their verdict is not permitted, except as necessary medicine, and its unauthorized use at such time by one or more jurors has usually been regarded in this country as furnishing grounds for setting aside a verdict in a case of felony." See also 7 ALR 2d 1040, 1053.

The appeals court in citing United States v. Provenzano, 602 F.2d 985 (3d Cir.) Cert. denied, 449 U.S. 899 (1980) equated juror

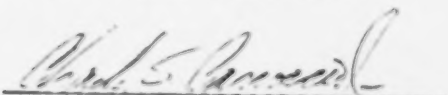
misconduct during trial, where there are available remedies, i.e. replace juror with alternate juror, that will afford defendants due process, with juror incompentence during deliberation, as in this case, where such alternative remedies are not available to protect defendants right to an impartial jury. This petitioner feels it is error and should be remedied.

The Constitution guarantees that when the jurors deliberate on a defendant's guilt or innocence, they be competent to deliberate. Since one juror was not competent to deliberate, the petitioner was denied a fair trial.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



CHARLES S. CARROCCIO, JR.
Counsel for Petitioner
105 South Washington Street
Rockville, Maryland 20850
(301) 424-3035

CERTIFICATE OF SERVICE

I, CHARLES S. CARROCCIO, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for ALVIN C. HINES, Petitioner herein, hereby certify that pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On United States of America, Appellee herein, by delivering the copies thereof to the Honorable Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and to Michael W. Farrell, Esquire, Assistant U. S. Attorney, attorney of record for the United States of America, Appellee, at his office located at Appellate Division, United States Attorney's Office, 4th and John Marshall Place, N. W., Washington, D. C. 20001, on June 1, 1983.

All parties required to be served have been served.

Charles S. Carroccio Jr.

CHARLES S. CARROCCIO, JR.
105 South Washington Street
Rockville, Maryland 20850
(301) 424-3035

Dated: June 28, 1983.

INDEX OF APPENDICES

Page A-1 Opinion of District of Columbia Court of Appeals, affirming the conviction of second degree burglary in the Superior Court for the District of Columbia.

Page A-8 Order of the District of Columbia Court of Appeals denying petition for rehearing or hearing *en banc*.

Larry T. LEE, Appellant,

v.

UNITED STATES, Appellee.

Alvin C. HINES, Appellant,

v.

UNITED STATES, Appellee.

John P. McILWAIN, Jr., Appellant,

v.

UNITED STATES, Appellee.

Nos. 81-1300, 81-1379 and 81-1390.

District of Columbia Court of Appeals.

Argued Oct. 6, 1982.

Decided Dec. 29, 1982.

Defendants were convicted before the Superior Court, District of Columbia, Fred B. Ugast, J., of second-degree burglary while armed, and they appealed. The Court of Appeals, Kern, J., held that: (1) apparent insobriety of jury foreperson was not shown to be prejudicial so as to warrant mistrial; (2) trial judge's failure, sua sponte, to conduct a more detailed inquiry, in regard to foreperson's insobriety, was not error; (3) in such proceeding in which defendants contended that operator and employee of the burglarized jewelry business offices had hired defendants to stage a robbery as part of insurance fraud scheme, refusal to admit evidence that operator and employee were the focus of federal criminal investigation for racketeering and "fencing" stolen goods was not abuse of discretion; (4) admission of tape recording of prearrest negotiations and videotape of arrest scene was not abuse of discretion; and (5) even if Government's failure to disclose tape recording and videotape to defense counsel in advance of trial violated discovery rule, such violation would not have rendered admission of the tapes an abuse of discretion.

Affirmed.

1. Criminal Law ⇐855(2)

Insobriety of a juror does not warrant a mistrial unless there is a showing of prejudice.

2. Criminal Law ⇐855(2)

In criminal proceeding, apparent insobriety of jury foreperson on one morning was not shown to be prejudicial so as to warrant mistrial under circumstances in which only a short period of deliberations was called into question, in which there was no indication that any drinking actually occurred in juryroom or during course of the trial, in which foreperson was not conclusively shown to be intoxicated and in which judge called three-day recess and subsequently determined that foreperson was sober before judge permitted resumption of deliberations.

3. Criminal Law ⇐868

In criminal proceeding in which trial judge, in conducting a voir dire after he was informed that jury foreperson might have been intoxicated, had questioned foreperson directly concerning her capacity to deliberate, had asked the other jurors whether they believed foreperson was experiencing any problems, such as drinking, that interfered with her capacity to function as juror and had consulted with counsel both before and after the voir dire, the failure, sua sponte, to conduct a more detailed inquiry was not error.

4. Criminal Law ⇐369.1

Generally, admission of evidence of other crimes or misconduct to prove character of a person to show that he acted in conformity therewith on the occasion in question is disfavored.

5. Witnesses ⇐344(2)

Though evidence of prior misconduct of accused may be introduced for certain limited purposes, such as to establish motive or intent, a witness other than accused may be asked about prior misconduct, not amounting to a criminal conviction, only if it bears directly upon veracity of the witness as to

the issues involved in the trial; even under those circumstances, trial judge must balance the prejudicial effect of the proffered evidence against its probative value in determining whether to admit it.

6. Criminal Law ⇐1153(4)
Witnesses ⇐344(2)

Trial court, within its discretion, may exclude evidence of a witness' prior misconduct, not amounting to a criminal conviction, if it appears that the danger of unfair prejudice will outweigh its probative value, and that determination is reversible only for abuse of discretion.

7. Criminal Law ⇐359

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, and in which they contended that operator of the business and employee had hired defendants to stage a robbery as part of insurance fraud scheme, refusal to admit evidence that operator and employee were the focus of federal criminal investigation for racketeering and "fencing" stolen goods was not abuse of discretion, in view of fact that prejudicial impact of such evidence would have been substantial and that its probative value would not have been great. D.C.Code 1981, §§ 22–1801, 22–3202.

8. Burglary ⇐41(1)

Evidence, including circumstantial evidence linking a defendant to the events occurring in jewelry business offices on date in question, was sufficient to sustain his conviction of second-degree burglary of such offices while armed. D.C.Code 1981, §§ 22–1801, 22–3202.

9. Criminal Law ⇐404(4)

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, admission into evidence of the money and jewelry taken from defendant when he was arrested was not abuse of discretion, in view of fact that custody was established showing that such items had been taken from defendant and that a second defendant identified the property being carried by first defendant as the jewelry business' property. D.C.Code 1981, §§ 22–1801, 22–3202.

10. Criminal Law ⇐438(8), 438.1

In proceeding in which defendants were convicted of second-degree burglary while armed, admission of tape recording of prearrest negotiations and videotape of arrest scene was not abuse of discretion due to fact that the tapes were potentially highly prejudicial, in view of fact that the tapes had some probative value, at least as corroborative evidence, that their actual prejudicial impact was probably minimal and that trial judge gave a cautionary instruction to jury. D.C.Code 1981, §§ 22–1801, 22–3202.

11. Criminal Law ⇐1166(1)

Though trial court has discretion to apply sanctions for Government's withholding evidence until trial, reversal is warranted only where there is error which has substantially prejudiced defendant's rights. Criminal Rule 16.

12. Criminal Law ⇐627.8(6)

In criminal proceeding, even if Government's failure to disclose tape recording of prearrest negotiations and videotape of arrest scene to defense counsel in advance of trial violated discovery rule, violation would not have rendered admission of the tapes into evidence an abuse of discretion, in view of fact that the tapes' actual prejudicial impact was probably minimal, that defense counsel could have requested a recess to hear and view the tapes, that there was confusion as to whether a request for discovery had been made and that Government had only recently obtained the videotape. Criminal Rule 16.

Charles S. Carroccio, Jr., Washington, D.C., appointed by this court for appellant Hines.

Barbara R. Miller, Public Defender Service, with whom William J. Mertens, Public Defender Service, Washington, D.C., was on the brief, for appellant McIlwain.

Thomas P. Murphy, Asst. U.S. Atty., Washington, D.C., with whom Stanley S. Harris, U.S. Atty., John A. Terry, Asst. U.S. Atty., Washington, D.C., at the time the brief was filed, and F. Joseph Warin, Asst. U.S. Atty., Washington, D.C., were on the brief, for appellee.

Edward Gross, appointed by this court, for appellant Lee.

Before NEWMAN, Chief Judge, and KERN and BELSON, Associate Judges.

KERN, Associate Judge:

Appellants challenge their convictions of second degree burglary while armed, D.C. Code 1981, §§ 22–1801, –3202, upon grounds, primarily, 1) that a mistrial should have been ordered when it appeared that one of the jurors was probably under the influence of alcohol during a part of the deliberations, and 2) that the trial judge erred in not making adequate inquiry into that juror's competence and the extent of the alleged insobriety. Finding no error, we affirm the convictions.

I

On December 18, 1980, the three appellants, armed with a gun, entered the offices of A.D.E., Inc., ("ADE"), a gold and silver jewelry business, and took $6000 cash and a large amount of jewelry from the operator, Allen Danneman, and an ADE employee, Lori Greenstein. Appellant Hines was arrested later that same day with $6000 cash, a collection of jewelry, and an imitation starter pistol in his coat and in a bag he had been carrying. Appellants Lee and McIlwain were arrested later that day, after police officers had surrounded the house they were in and had conducted negotiations by telephone for their surrender.

At trial, the appellants conceded that they had entered the offices of ADE on the date in question and removed the property alleged to have been stolen. However, they asserted in defense that Danneman and Greenstein had consented to the "robbery" of ADE and had, in fact, hired the three of them (for $2000 apiece plus a quantity of jewelry) to stage the robbery as part of an insurance fraud scheme.

Trial had commenced in the Superior Court on July 22, 1981. On July 30, 1981, testimony was completed, closing arguments were heard, and the case was submitted to the jury late in the day. The jury deliberated for less than an hour that evening and were instructed to reassemble in the jury room by 9:15 the following morning. At approximately 10:20 the next day, Friday, the trial judge received a note from the jury stating that they "would like to change the foreperson of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning." (Record at 1088.) The judge remarked at that point that his chambers had received a telephone call earlier that morning indicating that a juror (the foreperson) would be late. (Record at 1089.) Shortly thereafter, the judge stated that the marshal had indicated there might be a question as to whether or not that juror was intoxicated. (Record at 1091.)

The judge then held a separate *voir dire* of each member of the jury, beginning with the foreperson, who denied that she had been drinking, stated that she did not feel ill, and suggested that the note from the jury may have been prompted by her "a little bit too straightforward" personality. (Record at 1093–96.) Of the other jurors, nine stated their belief that the jury foreperson had been (variously) "a little intoxicated," "drinking," "under the influence of some kind," or "drunk." (Record at 1102–1117.) However, one juror stated that there was no indication that the jury foreperson had been drinking. (Record at 1100.) In response to questions concerning the foreperson's conduct in deliberations the day before and during the course of the trial, only two jurors stated a belief that the foreperson may have been drinking or

intoxicated at any earlier time. Most of the jurors indicated that they had seen no evidence that the foreperson had been intoxicated the previous afternoon. However, several of the jurors stated their displeasure with the jury foreperson's overbearing personality during deliberations, suggesting that she had been "rude" and "unreasonable." (Record at 1088 and 1100.)

At the conclusion of the *voir dire*, the trial judge suggested that the appellants consider dismissing the foreperson and submitting the case to the remaining eleven jurors. Appellants decided against that course of action and instead moved for a mistrial. The court denied the motion, but ordered an immediate three-day recess for the weekend, stating a "hope" that the "offending juror [would be] perfectly sober and able to deliberate" on Monday morning. (Record at 1120.) The trial judge expressly asked the jury foreperson to "come back on Monday refreshed." (Record at 1127.) He said further that, when the jury reassembled on Monday morning, he would ask them to come into court, so that he could observe their demeanor to be assured that they were able to deliberate. (Record at 1124–25.) It is not disputed that the judge did look in on the jurors on Monday morning before they resumed deliberations and that he told counsel that he saw no disabilities. The jury then resumed deliberations with no further complaints or incidents.

Aside from the motion for a mistrial, which was denied, the appellants made no specific contemporaneous objections to the course of action taken by the trial court—the declaration of a recess, with the trial judge stating his intention to observe the jury's appearance prior to the resumption of deliberations. Nor had appellants objected to the scope of the court's inquiry into the problem of possible intoxication of the foreperson.

II

Appellants argue that the trial court erred in denying their motion for a mistrial on the basis of the apparent insobriety of the jury foreperson.[1] Appellants' argument amounts to a proposal for a per se rule that, whenever there are strong indications either of the use of intoxicating liquor by a juror, or of a juror's intoxication, during the course of jury deliberations, a mistrial is warranted.

However, in other cases involving similar allegations of misconduct this court has declined to adopt such a rule but has, instead, required a showing of some reasonable ground to suspect that the defendant was prejudiced by the behavior in question. *E.g., Nelson v. United States*, D.C.App., 378 A.2d 657 (1977). In the *Nelson* case, where it was argued that a juror's temporary absences from the deliberations had deprived the defendants of their right to a trial by jury, we noted that juror misconduct will not be tolerated if it has resulted in "*substantial prejudice*" to a defendant. *Id.* at 660 (emphasis added). We held in that case:

> . . . not every irregularity in a juror's conduct compels reversal. The dereliction must be such as to deprive the defendant of the continued, objective, and disinterested judgment of the juror, thereby foreclosing the accused's right to a fair trial. [*Id.* (citations omitted).]

[1] The showing of prejudice which we have required achieves a balance of the important competing interests at stake.[2]

1. The government argues that the evidence did not establish that the jury foreperson had been drinking. However, there were significant indications of an intoxication problem, and they prompted the trial court's action in ordering a recess. We will assume that the jury foreperson was, as the trial judge stated, "somewhat under the influence in a fashion . . . that makes deliberations . . . inappropriate at this time." (Record at 1119.)

2. The federal courts of appeals for the Third and Fourth Circuits have also imposed requirements of a showing of prejudice in similar cases. *See United States v. Provenzano*, 620 F.2d 985, 997 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980) (smoking of marijuana during the course of trial does not require new trial absent showing of prejudice; is not prejudicial as a matter of law); *United States v. Taliaferro*, 558 F.2d 724,

On the one hand is the right of the accused to have the charges against him or her fairly and competently considered; and the need to maintain public confidence in, and respect for, the integrity of the jury system. On the other hand are the interests of the parties in having the matter timely resolved; the need to avoid unnecessarily ordering new trials, at great expense of judicial resources, when there is no serious reason to believe that the accused has *not* had a fair and competent jury; and the dangers of the court's becoming excessively involved in, or exerting pressure upon, the jury's deliberative process. We will therefore adhere to the requirement of a showing of prejudice in the instant case.[3]

[2] We conclude, further, that in the present case there is no serious reason to believe that the appellants were prejudiced by the jury foreperson's apparent inappropriate behavior. The jury deliberated for less than an hour on Thursday afternoon, during which time the evidence suggests that the foreperson was able to preside. There is insubstantial evidence that the jury foreperson was drinking earlier in the course of the trial or was more than simply overbearing prior to the second day of deliberations. On Friday morning, the foreperson was late arriving, but the jury was assembled for little more than an hour (from 9:15 until 10:20), during which time it appears they focused their attention on the selection of a new foreperson. It is thus doubtful that any significant deliberations occurred on Friday morning. As soon as the problem was brought to the court's attention, the *voir dire* was held and a recess was ordered; and on Monday morning, the trial judge concluded that the juror was sober and competent to consider the case before he permitted the jury to resume deliberations.

During this whole process, only one juror was involved, and only a short period of the deliberations was called into question. There is no evidence that any drinking actually occurred in the jury room or during the course of the trial, and the jury foreperson was not conclusively shown to have been intoxicated at the time of *voir dire*. The recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellants' counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors.

[3] We now turn to appellants' second contention, that the trial court erred in not conducting a more extensive inquiry into the jury foreperson's competence to deliberate.

Before the trial judge held the *voir dire*, he consulted with counsel. When he conducted the *voir dire*, he questioned the jury foreperson directly concerning her capacity to deliberate, and at that point he had an opportunity to observe her demeanor. He then asked the other jurors on the panel, specifically whether they believed the jury foreperson was experiencing any problems, such as drinking, which interfered with her capacity to function as a juror. He consulted with counsel again after the *voir dire* was completed. At no point before, during, or after the *voir dire* did appellants' counsel

726 (4th Cir.1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 734, 54 L.Ed.2d 761 (1978) (showing of prejudice required when new trial sought because jurors drank alcoholic beverages during dinner recess).

3. This requirement is consistent with the National District Attorneys Association's National Prosecution Standards and with the American Bar Association's Standards for Criminal Justice, which suggest that a jury verdict should be impeached only when a juror has been intoxicated during deliberations "to such an extent as to interfere with the capacity to reach a verdict." *See* ABA, Standards for Criminal Justice 15–4.7 (2nd ed. 1980), commentary at 162, *quoting* NDAA, National Prosecution Standards 17.19(D) (1977), commentary at 286. The court in *State v. Tallow*, 34 Kan. 80, 8 P. 267 (1885), cited in appellant Hines' brief, imposed the same requirement of a showing of prejudice on facts similar to those of the instant case.

object to the extent of the trial judge's questioning, or ask that he probe further into the situation, or request an opportunity to question the jurors themselves. Counsel, in effect, acceded to the scope of the inquiry. Considering that a full *voir dire* was held, that the court consulted with counsel and thus provided them with an opportunity to offer suggestions and express any concerns or dissatisfaction regarding his approach to the problem, and that preventive measures were available and were taken to avoid prejudice to the appellants, the trial judge's decision not to conduct a more detailed inquiry, *sua sponte*, was in our view not error. We conclude that the inquiry made was appropriate to the circumstances of this case.

III

Appellants argue as an additional ground for reversal that the trial court improperly limited the evidence concerning certain uncharged criminal conduct of ADE, Allen Danneman, and Lori Greenstein. Appellants contend that they should have been allowed to elicit testimony showing that these complainants were the focus of a federal criminal investigation for racketeering and "fencing" stolen goods. They argue that such evidence would have been relevant to their defense of consent because it would have established that the victims had a reason to hire the appellants to stage a robbery of ADE, *i.e.*, to launder "hot" jewelry.

[4–6] The law generally disfavors the admission of evidence of other crimes or misconduct to prove the character of a person to show that he acted in conformity therewith on the occasion in question. *See* McCORMICK ON EVIDENCE § 190 (E. Cleary ed. 1972); Fed.R.Evid. 404(b); *Drew v. United States*, 118 U.S.App.D.C. 11, 15, 331 F.2d 85, 89 (1964). *E.g.*, *McLean v. United States*, D.C.App., 377 A.2d 74, 77 (1977). Although evidence of prior misconduct of an accused may be introduced for certain limited purposes, such as to establish motive or intent, a witness other than the accused may be asked about prior misconduct, not amounting to a criminal conviction, only if it bears directly upon the veracity of the witness as to the issues involved in the trial. *Kitchen v. United States*, 95 U.S.App.D.C. 277, 279, 221 F.2d 832, 834 (1955), *cert. denied*, 357 U.S. 928, 78 S.Ct. 1378, 2 L.Ed.2d 1374 (1958). Even under those circumstances, the trial judge must balance the prejudicial effect of the proffered evidence against its probative value in determining whether to admit it. *Wooten v. United States*, D.C.App., 285 A.2d 308, 309 (1971); *United States v. Gay*, 133 U.S.App.D.C. 337, 339, 410 F.2d 1036, 1038 (1969), *cert. denied*, 400 U.S. 867, 91 S.Ct. 109, 27 L.Ed.2d 107 (1970). The trial court, within its discretion, may exclude the proffered evidence if it appears that the danger of unfair prejudice will outweigh its probative value; and that determination is reversible only for abuse of discretion. *Brown v. United States*, D.C.App., 409 A.2d 1093, 1099–1100 (1979).

[7] In the instant case, the prejudicial impact of the proffered evidence is substantial: from evidence that the victims of the alleged burglary were themselves under criminal investigation, the jury would be permitted to infer that the victims had the kind of bad character which would make it likely that they had planned a staged robbery to defraud their insurers. On the other hand, the probative value of the evidence would not have been great: appellants' theory of relevance is somewhat tenuous, that the prior misconduct of ADE, involving stolen goods, would show that ADE planned the robbery in order to launder stolen jewelry. Moreover, the proffered evidence does not bear directly on the truthfulness of witnesses at trial. For these reasons, we conclude that there was no abuse of discretion on the part of the trial court in restricting the evidence concerning the prior misconduct of ADE, Danneman, and Greenstein. Further, we note that the appellants were not prejudiced by the trial court's ruling to this effect, since they were ultimately successful in getting much of the evidence before the jury nonetheless.

[8, 9] Finally, appellants raised another issue in their briefs, which was not dis-

cussed at oral argument.[4] They contend that a tape recording of the prearrest negotiations and a videotape of the arrest scene were improperly admitted into evidence because they were unfairly prejudicial and because they had not been disclosed in advance to defense counsel.

[10] Both tapes were potentially highly prejudicial, permitting the inference that appellants were extremely dangerous and the inference that they were guilty simply because they refused to submit to arrest immediately. However, because the tapes had some probative value, at least as corroborative evidence, because their actual prejudicial impact was probably minimal (since the tapes were cumulative of other evidence), and because the trial judge gave a cautionary instruction to the jury, (Record at 1077–78), we conclude that the trial judge did not abuse his discretion in admitting the tapes despite their possible prejudicial effect.

[11, 12] Regarding the failure of the government to disclose the tapes to defense counsel in advance of trial, appellants rely upon Super.Ct.Cr.R. 16, which allows a defendant to discover his own recorded statements and real evidence, such as the videotape, which is within the government's custody. Assuming that the appellants had made a proper request for all such discoverable materials (which the government disputes), and assuming that late disclosure in the instant case did violate the requirements and purposes of Rule 16, the trial court had discretion to apply sanctions for the government's withholding evidence until trial. *See Lee v. United States*, D.C.App., 385 A.2d 159, 163 (1978). Reversal is warranted, however, only where there is error which has substantially prejudiced appellants' rights. *Id.* at 164. In light of our holding that the tapes themselves were not unfairly prejudicial, considering that defense counsel could have requested a recess to hear and view the tapes before they were played to the jury, but did not do so, and bearing in mind both that there was confusion as to whether a request for discovery had been made and that the government had only recently obtained the videotape, we conclude that the trial judge did not abuse his discretion in admitting the tapes into evidence.

In sum, the trial court committed no reversible error in any alleged respect.

Affirmed.

4. Appellant Hines argues two additional errors. He asserts that the trial court erred in denying his motion for acquittal and in admitting into evidence the money and jewelry taken from him when he was arrested. On the latter point, he argues that the money and jewelry were never properly identified as belonging to ADE. We reject both contentions. There was ample circumstantial evidence linking appellant Hines to the events which occurred at the ADE offices on the date in question, and there is evidentiary support for each element of the offense of which he was convicted. *See Jennings v. United States*, D.C.App., 431 A.2d 552, 555 (1981); *Frendak v. United States*, D.C.App., 408 A.2d 364, 370–71 (1979); *Williams v. United States*, D.C.App., 357 A.2d 865, 867 (1976). Appellant has failed to show, as required for a reversal on grounds of insufficient evidence, that "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Frendak, supra* at 371. Likewise, there was no abuse of discretion in the admission of the money and jewelry taken from Hines upon his arrest, since a chain of custody was established showing that those items had been taken from Hines, and since his codefendant Lee identified the property Hines had been carrying as ADE property.

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED MAR 30 1983

Clerk

No. 81-1300
LARRY T. LEE, Appellant, F 7141-80

No. 81-1379
ALVIN C. HINES, Appellant, F 7140-80

No. 81-1390
JOHN P. McILWAIN, JR., Appellant, F 7139-80

v.

UNITED STATES, Appellee.

BEFORE: *Newman, Chief Judge; Kelly, *Kern, Nebeker, Mack, Ferren, Pryor, *Belson, and **Terry, Associate Judges.

ORDER

On consideration of appellants' petitions for rehearing and rehearing en banc, it is

ORDERED by the merits division that the petitions for rehearing are denied. It appearing that no judge of this court has called for votes thereon, it is

FURTHER ORDERED that appellants' petitions for rehearing en banc are denied.

PER CURIAM

Copies to:

Honorable Fred B. Ugast

Clerk, Superior Court

Edward Gross, Esq.
4020 University Drive, #302
Fairfax, VA 22030

Michael W. Farrell, Esq.
Assistant U. S. Attorney

Charles S. Carroccio, Jr., Esq.
105 South Washington Street
Rockville, MD 20850

A. Franklin Burgess, Jr., Esq.
Public Defender Service

*Denotes merits division.
**Associate Judge Terry has recused himself from participation in this matter.

Nos. 82-6780 and 82-6997

Office - Supreme Court, U.S.
FILED
AUG 10 1983
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN McILWAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ALVIN C. HINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MacQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners should have been granted a mistrial due to the apparent temporary insobriety of a juror where no showing of prejudice has been made.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-6780

JOHN McILWAIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-6997

ALVIN C. HINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. A1-A7) 1/ is reported at 454 A.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1982. A petition for rehearing was denied on March 30, 1983. The petition for a writ of certiorari in No. 82-6780 was filed on May 20, 1983. The petition for a writ of certiorari in No. 82-6997 was filed on June 28, 1983, and is therefore out of time under Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

1/ "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-6997.

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioners were convicted of second degree armed burglary, in violation of 22 D.C. Code 1801 and 3202, and were each sentenced to imprisonment for ten to thirty years. 2/

1. The evidence at trial showed that in December 1980 petitioners and co-defendant Lee entered the offices of A.D.E., Inc., a gold and silver jewelry business, in Washington, D.C., and took $6,000 and a large amount of jewelry at gunpoint from the owner and an employee. Shortly thereafter, a witness saw the three men drive off in a yellow Mustang and recorded the automobile's license plate number. Later the same day, police officers located the automobile and arrested petitioner Hines. At the time of his arrest, Hines was in possession of $6,000 in cash, a collection of jewelry, a 357 magnum blank revolver and six blank cartridges. Lee and petitioner McIlwain were arrested later the same day at Lee's house, where a search conducted pursuant to a warrant uncovered more jewelry, coins, and precious metals, as well as a loaded .38 caliber revolver. No. 82-6997 Pet. 2-3; No. 82-6780 Pet. 5-6.

2. Trial commenced on July 22, 1981, and the case was submitted to the jury at approximately 4 p.m. on Thursday, July 30, 1981. After the jurors deliberated for approximately an hour that day, they were instructed to report back the next morning at 9:15 a.m. On Friday morning the court received a telephone call indicating that the foreperson would be late. Before the foreperson arrived, the jury selected another juror to act as foreman. Shortly thereafter, at approximately 10:20 a.m., the trial judge received a note from the jurors stating they "would like to change the foreperson of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning" (Pet. App. A3).

2/ Petitioners were acquitted on two counts charging armed robbery, in violation of 22 D.C. Code 1801 and 3202. Co-defendant Larry Lee was similarly convicted and sentenced.

The judge then held a separate voir dire of each member of the jury. The foreperson denied that she had been drinking, stated that she did not feel ill, and suggested that the note from the jury may have been prompted by the fact that her personality was "a little bit too straightforward." One juror agreed that there was no indication that the foreperson had been drinking, but nine other jurors suggested that the juror in question had been "a little intoxicated," "drinking," "under the influence of some kind," or "drunk." Only two jurors believed that the foreperson may have been drinking or intoxicated at any earlier time during the trial or the previous afternoon's brief deliberations; most denied that the foreperson had appeared intoxicated the previous afternoon. Finally, several jurors stated their displeasure with the jury foreperson's overbearing personality during deliberations, suggesting that she had been "rude" and "unreasonable" (Pet. App. A3-A4).

At the conclusion of the voir dire the trial judge suggested that petitioners dismiss the foreperson and submit the case to the remaining eleven jurors. Petitioners rejected that suggestion and instead moved for a mistrial. The judge denied the motion, but ordered an immediate three-day recess for the weekend, stating a "hope" that the "offending juror [would be] perfectly sober and able to deliberate" on Monday morning. On Monday the court determined, before the jury resumed its deliberations, that the juror in question was not intoxicated. The jury then resumed deliberations with no further complaints or incidents. Pet. App. A4.

3. The court of appeals affirmed. Pet. App. A1-A7. It rejected petitioner's argument that a mistrial is mandated whenever there are strong indications that a juror has been drinking or is intoxicated during deliberations. Instead, the court held that in the absence of "a showing of some reasonable ground to suspect the defendant was prejudiced by the behavior in question," neither a mistrial nor reversal is indicated (Pet. App. A4). The court then

analyzed the facts and concluded that the juror was not intoxicated during "any significant deliberations" (id. at A5), and that when deliberations were subsequently resumed, any prior intoxication had been remedied. Accordingly, the court concluded there was no possiblity of prejudice to petitioners' "right to the judgment of objective and competent jurors" (ibid.).

ARGUMENT

Petitioners contend (No. 82-6780 Pet. 12-17; No. 82-6997 Pet. 6-8) that they were denied their Fifth Amendment right to due process and their Sixth Amendment right to an impartial jury due to the reported intoxication of a juror during deliberations. The court below correctly held that there must be a showing of prejudice and there was no reason to believe that the participation of the foreperson in the limited deliberations on Friday morning was so prejudicial as to warrant a mistrial. The issue does not merit further review.

The right to a fair trial by an impartial jury is unquestioned. Irvin v. Dowd, 366 U.S. 717, 721-722 (1961); In re Murchison, 349 U.S. 133, 136 (1955); see Peters v. Kiff, 407 U.S. 493, 501-502 (1972) (citing cases). Nevertheless "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982).

In language applicable to the instant case the Court stated in Smith v. Phillips, supra, 455 U.S. at 217:

> [Remmer v. United States, 347 U.S. 227 (1954); Dennis v. United States, 339 U.S. 162 (1950); Chandler v. Florida, 449 U.S. 560 (1981)] demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.

Thus, the court below correctly rejected any per se rule that juror's intoxication requires a mistrial in the absence of a showing of prejudice to the defendant. See United States v. Provenzano, 620 F.2d 985, 997 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Taliaferro, 558 F.2d 724, 726 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); Nelson v. United States, 378 A.2d 657, 660 (D.C. App. 1977).

Here the trial judge promptly conducted a voir dire that resulted in a three-day recess when he determined that there was a question whether the foreperson could deliberate at that time. There was no showing that petitioners were prejudiced by the jury foreperson's brief participation in any deliberations that may have taken place on Friday morning during the jury's short discussion concerning the selection of a new foreperson. A juror's temporary incompetence to deliberate, standing alone, does not necessarily indicate bias towards a defendant. In this case, no questioned juror even remotely indicated that the foreperson was prejudiced against or hostile towards the defendants. As pointed out by the court below, at no point before, during or after the voir dire did petitioners object to the extent of the trial judge's questioning or ask that he probe further, nor did they request an opportunity to question the jurors themselves (App. A5-A6).

Assuming arguendo the appearance of bias due to the foreperson being "under the influence in a fashion * * * that makes deliberations * * * inappropriate at this time" (App. A4 n.1), the court's prompt call for a recess enabled the deliberations to proceed in normal fashion on Monday under the "watchful" eye of the trial judge. See Smith v. Phillips, supra, at 217. 3/

3/ It should be noted that petitioners were found not guilty on two counts of armed robbery, reflecting the jury's ability to deliberate and distinguish the facts at issue.

Contrary to petitioner McIlwain's argument (No. 82-6780 Pet. 12-13), the juror's temporary incapacity to deliberate, which was readily dealt with by the trial court, cannot be equated with a total incapacity of an insane juror to function throughout the deliberations. Rather, the present case is akin to the brief recess that would be necessitated by the temporary illness or sickness of a juror.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MacQUEENEY
Attorney

AUGUST 1983